No. 75-1432

In the Supreme Court of the United States

OCTOBER TERM, 1975

LEROY W. ABELL AND JACK R. BARGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners are hourly employees of the Bonneville Power Administration of the Department of the Interior, whose compensation is fixed through collective bargaining. They brought this action in the Court of Claims, contending that under the statutes governing their employment they are entitled to an additional 25 percent pay for Sunday work. The Court of Claims rejected that contention and upheld the validity of the present level of compensation (Pet. App. A, pp. 1a-24a).

The Administrator of the Bonneville Power Administration has authority to fix petitioners' compensation, by collective bargaining or otherwise, under Section 10(b) of the Bonneville Project Act of 1937, 50 Stat. 736, as added and amended, 59 Stat. 547.[1] That statute empowers

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[1]The statute was incorrectly codified at 16 U.S.C. 832i(b). See Pet. App. A, pp. 11a-13a.

the Administrator to "employ laborers, mechanics, and workmen in connection with construction work or the operation and maintenance of electrical facilities * * * and fix their compensation without regard to the Classification Act of 1923, as amended, and any other laws, rules, or regulations relating to the payment of employees of the United States * * *." Congress granted that authority to the Administrator in 1945 to alleviate the "problems in recruiting and retaining the skilled and semi-skilled workmen essential for operation of [the Administration's] complex facilities" (Pet. App. A, p. 6a).

Petitioners contend that this authority to fix compensation without regard to other laws was implicitly repealed by the Classification Act of 1949, as amended, 5 U.S.C. 5101, *et seq.*, and that they are therefore entitled to the 25 percent premium pay for Sunday work allowed to "prevailing rate employees" by the Federal Employees Salary Act of 1966, as amended, 5 U.S.C. (Supp. IV) 5544(a).

The Court of Claims correctly held that Section 10(b) of the Bonneville Project Act has not been repealed by implication. Section 1204 of the Classification Act of 1949, 63 Stat. 973, does provide that "[a]ll laws or parts of laws inconsistent with this Act are hereby repealed to the extent of such inconsistency." There is, however, no inconsistency between Section 10(b) and the 1949 Act. The latter Act by its terms does not apply to "employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semiskilled, or skilled manual-labor occupations * * *." 5 U.S.C. 5102(c)(7). It does not apply, in other words, to the "laborers, mechanics, and workmen," such as petitioners, whose compensation the Administrator is empowered by Section 10(b) to fix "without regard to * * * any other laws, rules, or regulations relating to

the payment of employees of the United States * * *."[2] Since the two statutes are not inconsistent in their operations, the earlier has not been displaced or repealed by the later. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 551; *United States* v. *Borden Co.*, 308 U.S. 188, 198.

In urging the contrary, petitioners refer to a 1959 letter from the Chairman of the Civil Service Commission to the Assistant General Counsel of the General Accounting Office, advising that laborers and mechanics employed by the Bonneville Power Administration fell within the 1949 Act's exception for craftsmen and unskilled, semiskilled, and skilled manual laborers (Pet. App. C). Petitioners place reliance (Pet. 15-21) upon the portion of the letter in which the Chairman expresses the view that Section 10(b) of the Bonneville Project Act has been superseded by the 1949 Act.

The Chairman based that view on Section 1106(b) of the 1949 Act, 63 Stat. 972 (Pet. App. C, p. 2c). Section 1106 (a) provides that all statutory references to the Classification Act of 1923 "shall be held and considered" to be references to the 1949 Act; Section 1106(b) further provides that the application of the 1949 Act "to any position, officer, or employee shall not be affected by reason of the enactment of [Section 1106(a)]."

Section 1106(b) could not have been intended, and it did not operate, to repeal Section 10(b) of the Bonneville Project Act. Indeed, Section 1106(b), read carefully, is irrelevant to Section 10(b): since the 1949 Act by its terms does not apply to the laborers, mechanics, and workmen with whom Section 10(b) is concerned, replacing

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[2]That the 1949 Act applies to the Administration as an "agency" (Pet. 22-24) is irrelevant in view of the fact that the Act leaves untouched the Administrator's authority with regard to the classes of employees here at issue.

Section 10(b)'s reference to the 1923 Act with one to the 1949 Act, as required by Section 1106(a), would not have affected the application of the 1949 Act even in the absence of Section 1106(b).

Petitioners contend that notwithstanding any possible analytical defects in the reasoning supporting the views expressed therein, the Chairman's letter bars the courts from holding that Section 10(b) survived enactment of the 1949 Act. They rely upon Section 203 of the 1949 Act, as amended, 5 U.S.C. 5103, which provides that the Civil Service Commission shall determine the applicability of the 1949 Act to specific positions and employees. But there is no dispute here over the Chairman's determination that the Bonneville employees fall within the 1949 Act's exception for craftsmen and unskilled, semi-skilled, and skilled manual laborers; the decision below does not challenge the correctness of that determination or interfere with the Commission's proper exercise of its jurisdiction. The issue before the Court of Claims was the separate question whether Section 10(b) had been repealed—a question that the Chairman's letter addressed but that the Commission had no power finally to decide. As the Court of Claims correctly observed (Pet. App. A, p. 17a), the question "whether a subsequent statute has, by implication, repealed a prior one is for the courts. *District of Columbia* v. *Hutton,* 143 U.S. 18, 27-28 (1892); *United States* v. *Claflin,* 97 U.S. 546, 549 (1878)."

In any event, it would not avail petitioners even if, as the Chairman's letter suggests, Section 1106(b) had been intended by Congress to effect a general repeal of all statutory exceptions to the 1923 Act. Such a repeal would have left standing that portion of Section 10(b) which empowers the Administrator to fix petitioner's compensation without regard to "any other laws * * * relating to the payment of employees of the United States * * *." That

provision, even standing alone, would be sufficient to defeat petitioners' present claim to additional Sunday overtime pay under the Federal Employees Salary Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.